**Deaconess Medical Center *and* Service Employees International Union, District 1199NW, AFL–CIO.** Case 19–RC–14366

April 15, 2004

## DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS LIEBMAN, SCHAUMBER , AND WALSH

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held April 24, 2003 and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 252 for and 266 against the Petitioner; 1 challenged ballot cast by an eligible voter that was not opened because it was not determinative; and 11 other, unresolved challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that the election must be set aside and a new election held.

The hearing officer found merit in the Petitioner's Objection 2, which alleged that the Employer interfered with the results of the election by threatening employees with the loss of a plan to restore wage rates if they selected the Union as their bargaining representative. We agree with the hearing officer's recommendation to sustain the objection for the following reasons.

### Factual Background

On March 14, 2003,[3] the Union filed a petition seeking an election in a bargaining unit of registered nurses employed by Deaconess Medical Center (Employer). Shortly before the Union filed its petition, the Employer implemented a nine-percent across-the-board wage reduction. The employees were informed of this reduction on March 3, and it became effective on March 17. The Employer told the employees at various times, however, that their wages would be restored when the Employer regained "financial stability," "profitability," or a "sustained positive level." During March and April, the Employer held several open forums to discuss the wage cut, the financial position of the hospital, and the plan to restore financial stability. While the Employer did not provide a specific date, the employees were repeatedly reassured that the Employer planned to restore wages when it regained financial stability.

During the election campaign, the Employer distributed materials to the employees to support its position that employees should vote against the Union. About April 8, the Employer distributed a flier which generally described the process of collective bargaining. The flier included the following statement:

> Q: Employees cannot lose what they already have, right?
>
> A: *That's not true at all!* At the start of and during bargaining, there generally are no changes to existing wages, benefits, and working conditions. *Generally, an employer is not allowed to make unilateral pay changes for bargaining unit employees during negotiations.* If, for example, the Hospital restored profitability, and wanted to give back some or all of the 9% pay reduction, it could easily make those pay adjustments for non-bargaining unit employees, but it would have an obligation to continue bargaining with the Union and could not unilaterally make those pay changes for the bargaining unit. The fact is that *as a result of bargaining, employees could get more, stay the same, or even get less.* [Emphasis in original.]

In the next paragraph, the flier stated that it could take months or even a year or more to negotiate a contract.

When asked, the Employer's managers reinforced the flier's message. Two RNs in the bargaining unit testified that their managers told them that if the Union won, their wages would be frozen until a contract was signed. Both RNs were told on separate occasions and with other unit employees present that if the Employer restored profitability and decided to give back some or all of the wage cut, employees who were not represented by a union could receive the wages immediately, whereas employees who selected a union would have their wages frozen until a contract resulted from bargaining, and bargaining could take as long as a year.

### Analysis

The issue in this case is whether the Employer engaged in objectionable conduct by threatening the employees with the loss of an established condition of employment

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that Petitioner's Objections 1, 3 and 5 be overruled. The Petitioner withdrew Objection 4 at the start of the hearing.

[3] All dates are 2003 unless stated otherwise.

if the Union won the election. In agreement with the hearing officer, we find that it did.

An employer's threat to take away existing terms or conditions of employment if its employees vote for union representation clearly interferes with employee free choice in the election. *Pearson Education, Inc.*, 336 NLRB 979 (2001). And conditions of employment encompass not only those wages, hours, and working conditions in force at the time, but also what the employer commits itself to grant in the future. *Liberty Telephone & Communications Inc.*, 204 NLRB 317 (1973) (conditions of employment include such things as the expected weekly wage, anticipated wage increases, and other announced or expected benefits); *Alpha Cellulose Corp.*, 265 NLRB 177 fn. 1 (1982), enfd. 718 F.2d 1088 (4th Cir. 1983) (finding that an employer has the duty to implement benefits which have become conditions of employment by virtue of prior commitment or practice). In particular, the existing terms and conditions of employment include promised, nondiscretionary wage increases. *More Truck Lines*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003).

In *Liberty Telephone*, supra, the Board held that the definition of "conditions of employment" includes not only what the employer has already granted, but also what it *proposes to grant.* 204 NLRB at 317. Terms and conditions of employment are comprised of the normal foreseeable expectations arising out of the employment relationship, including, inter alia, "announced or expected benefits." Id. The Board's use of the disjunctive makes it clear that the Employer's announced—even if unexpected—benefit of conditional restoration of previous wage rates upon the company's return to financial stability fits easily within the definition of terms and conditions of employment. Thus, contrary to our colleague's view of *Liberty Telephone*, the result in that case did not turn on whether the employees had a reasonable expectation based on past employer practice that they were going to get the announced but subsequently cancelled wage increase.

Moreover, the Board and the courts have determined that a matter is a reasonable expectancy of the employment relationship, and thus a term and condition of employment, if it in fact acted as an inducement to employees to accept or continue employment. 204 NLRB at 317–318. The Employer's conditional promise of restoration of the nine-percent wage cut if the company regained financial stability certainly satisfies that standard. It is entirely reasonable under *Liberty Telephone* to infer here that, notwithstanding the depressed condition of the Employer's wages following its nine percent across-the-board reduction, current employees would nevertheless be induced to stay, new employees would be induced to join, and all employees would be induced to work particularly hard, to achieve the financial benefits of the Employer's repeated promises to restore previous wage levels if and when it regained financial stability.

In *Pearson Education, Inc.*, supra, the Board concluded that the employer's threat to withhold a promised wage increase if the employees chose the union was objectionable conduct sufficient to set aside the election. The employer announced, shortly before the election, that it would provide unit employees who stayed with the employer following its move to its new location a $1.10 per-hour-raise effective with the opening of the new facility. Shortly after making that promise and just days before the union election, the employer distributed a leaflet which informed employees that the employer would be able to implement the wage increase to represented employees if the union lost, but all wages and benefits would have to be negotiated if the Union won.

The Board found that the employer's leaflet was a threat to withdraw a promised benefit. Because the raise was promised before the election and before the employer had a duty to bargain, the Board found that the employer had a duty to implement that raise at the scheduled time, even if the union won the election, and that its threat to withhold the raise clearly interfered with employee free choice.

Applying the above principles to the facts of this case, we find in agreement with the hearing officer that the Employer's prepetition promise to the employees to restore their wages was a term and condition of their employment.[4] The promise was conditioned only on the

[4] Our colleague's reliance on *American Mirror Co.*, 269 NLRB 1091 (1984), for a contrary result is unavailing. *American Mirror* does not involve a question of whether and under what circumstances a prepetition promise to employees of a new benefit constitutes a condition of employment. Rather, *American Mirror* involves the question of whether the respondent violated the Act by threatening to and in fact unilaterally discontinuing a well-established pattern of periodic general wage increases (31 such increases in the 11 years prior to the events in question) of varying amounts and timing during the years, in retaliation against the employees' union and organizational activities and in derogation of the respondent's obligation to bargain with the union about the discontinuation of these periodic wage increases. *American Mirror* neither addresses nor resolves by implication the underlying issue before us here: whether the Employer's express repeated promises to its employees to restore wage levels if the Employer regained financial stability constituted a condition of the employees' employment, such that the Employer could not thereafter legitimately threaten to withhold any such restoration of wages from employees who elected to be represented by the Union. Because *American Mirror* is thus distinguishable from the instant case, it is unnecessary for us to pass on whether it was correctly decided. Cf. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996) (periodic wage increases become conditions of employment if they are an established practice, regularly expected by the employees).

Employer's return to "financial stability," "profitability," or a "sustained positive level," as determined by the Employer. If and when the Employer determined that this precondition to restoration of wages was satisfied, the Employer would then be obligated to fulfill its otherwise unqualified prepetition promise to restore wages for *all* of its employees. After the Union filed its petition for an election, however, the Employer told the employees that while it could easily restore the wages of nonrepresented employees if the Employer regained profitability, it could not do the same for employees who had become represented by the Union. That was a threat to withhold a prepetition promised across-the-board wage increase from employees who subsequently elected to be represented by the Union for purposes of collective bargaining. The threat was objectionable and warrants setting aside the election.[5] *Pearson Education, Inc.*, supra; *More Truck Lines*, 336 NLRB 772 (2001) (employer engaged in objectionable conduct when it told employees that if the new union was certified, an existing collective-bargaining agreement would be null and void and scheduled annual wage increases would not be given).

Our dissenting colleague finds that the Employer did not threaten employees with the loss of the plan to restore wages, but rather finds that the promise was too tenuous, too dependent on the Employer's discretion for the Employer to be able to implement it unilaterally. Our colleague misses the mark. As stated above, we recognize that the promise was conditioned upon the Employer's determination of its financial situation. If, however, the Employer made that determination, it was obligated, by its own promise, to restore the wage cut for unit employees as well as all other employees. Therefore, it was not legally accurate to tell unit employees that it would not be able to unilaterally apply any possible wage restoration to them if the Union were selected. Rather, we find that such a statement was a threat to penalize employees for exercising their right to choose union representation.[6]

Accordingly, we sustain Petitioner's Objection 2, set aside the election, and direct that a second election be held.[7]

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Service Employees International Union, District 1199NW, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care*

[5] We do not disagree with our colleague that the Employer could ultimately choose to restore wages all at once, incrementally, or not at all, depending on its financial situation. We are only finding here that the Employer could not properly threaten, contrary to the all-inclusive terms of its prepetition promise, that if it *did* restore wages (whenever, and to whatever extent), it would do so for everyone *except* those who had elected to be represented by the Union. In contemplating which way to vote, the employees would reasonably understand from the Employer's April 8 flier and the ensuing remarks of its managers, discussed above, that a union defeat would keep them in the running for the conditionally promised wage increase, while a union victory would take them out of the running for it. The Employer's statements thus had a reasonable tendency to interfere with the employees' exercise of their right freely to choose whether to be represented by the Union.

[6] Setting aside the instant election because of the Employer's threat is additionally warranted by the closeness of the election: 48 percent for the Union, 50 percent against, and 2 percent challenged.

[7] In setting aside this election and directing a new one, we are not, as our colleague claims, penalizing the Employer. That is not, nor should it be, our focus. Rather, we are finding that the Employer interfered with employee free choice and we are therefore directing that the employees be given a second chance to vote on whether or not to be represented by the Union, this time without interference— from anyone.

*Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. April 15, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

In March 2003, due to severe financial difficulties, the Employer was forced to cut all employees' wages by nine percent. At the time the cut was announced, all employees were reassured that the Employer did not intend for the cuts to be permanent, but that they were necessary for the hospital's financial health. The employees were told that the wages would be restored to the pre-March level when the Employer's financial condition had "stabilized," i.e., when profitability had been restored. On the heels of the wage cut announcement, the Union filed its petition for an election to represent the RNs.

At issue in this case is whether the Employer interfered with the election by explaining to employees that if they voted for the Union, any effort to restore their wages could not be undertaken unilaterally, but instead would be subject to the bargaining process. Contrary to the majority, the legal reality was that, in the absence of an established past practice concerning wage restoration, the Employer could not change the wages of represented employees without bargaining with the Union. Therefore the statements in the campaign literature and by managers to that effect were accurate statements of the Employer's obligations under the law. My colleagues' conclusion to the contrary penalizes the Employer for explaining to employees its legal responsibilities. For these reasons, I respectfully dissent.

## Facts

The Employer's financial condition had reached a critical low by the end of 2002 and continuing into 2003. After other measures failed to turn the financial difficulties around, the Employer was forced to cut all employees' wages by nine percent in March 2003. The employees were told at the time of the wage cut that wages would be restored when the Employer achieved financial stability. The employees were not given any timeframe for this to occur, and the Employer informed them that the wages might be restored all at once or in increments.

The Union filed its petition seeking representation of the RNs on March 14, just after the wage cut announcement and 3 days before the wage cut became effective. During the Union campaign, the Employer distributed a question and answer flier which outlined the Employer's legal position regarding any possible wage restoration for unit employees, stating:

> Q: Employees cannot lose what they already have, right?
>
> A: *That's not true at all!* At the start of and during bargaining, there generally are no changes to existing wages, benefits, and working conditions. *Generally, an employer is not allowed to make unilateral pay changes for bargaining unit employees during negotiations.* If, for example, the Hospital restored profitability, and wanted to give back some or all of the 9% pay reduction, it could easily make those pay adjustments for non-bargaining unit employees, but it would have an obligation to continue bargaining with the Union and could not unilaterally make those pay changes for the bargaining unit. The fact is that *as a result of bargaining, employees could get more, stay the same, or even get less.* [Emphasis in original.]

In the next paragraph, the Employer truthfully stated that the law does not place a time limit on bargaining, and that it can take months or even a year or more to reach an agreement. During the election campaign, employees occasionally asked their managers about the possible effect unionization would have on the wage issue. In response, managers on two occasions told employees that if the Employer became profitable, it would not be able to unilaterally restore wages to union employees, but that it would take this issue to the Union for bargaining.

## Analysis

The issue in this case is whether the Employer threatened employees with the loss of a condition of employment if the Union won the election. Resolution of that issue turns on whether the Employer's statements that wages would be restored when it reached financial stability established a new condition of employment. The majority answers this question in the affirmative. I disagree.

It is accurate, as stated by the majority, that a "condition of employment" can include promised benefits. However, not all employer announcements and intentions rise to that level. For a statement of intent, such as

the one at issue in this case, to be a "condition of employment," there must be a "reasonable certainty" as to the timing and criteria of its implementation. *American Mirror Co.*, 269 NLRB 1091, 1094 (1984) (employer lawfully told all employees in a meeting 2 days before the election that no raises would be given because of the union campaign, where no wage increase was scheduled, promised, determined, or announced); Cf., *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875–876 (5th Cir. 1979) (employer must bargain over wage increase which did not result from "purely automatic" policy and was not pursuant to "definite guidelines").

Applying these principles, the Employer's statements that wages would be restored when it reached financial stability did not establish a condition of employment because those statements were too uncertain and discretionary.[1] The employees were not given any timeframe or plan for the wage restoration or determination as to what would constitute "financial stability." It is undisputed that the Employer could choose to restore wages all at once, incrementally, or not at all, depending entirely on its own determination of its financial situation. Thus, the "promise" of wage restoration was dependent on events that might never occur. Furthermore, there was no established practice of cutting wages then restoring them at a later date. Under the circumstances, there was no promise or commitment on which employees could reasonably rely, and it stretches the facts to find, as my colleagues do, that the Employer's statements established a condition of employment.[2]

The majority does not deny that the Employer retained sole discretion over the wage restoration decision, but finds at the same time that the Employer did not have to bargain over that decision if the Union became the bargaining representative. Indeed, the majority finds that the Employer had a duty to implement the restoration for all employees if it determined it was in a financial position to do so, without bargaining with the Union. However, the Board and the courts have consistently held that discretionary wage increases are the type of action over which an employer must bargain with a newly certified union. See *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); *NLRB v. Allis-Chalmers Corp.*, supra, enfg. 234 NLRB 350 (1978). Applying this precedent, the Employer would have to bargain over the discretionary wage restoration and could not implement it unilaterally.

In finding otherwise, the majority relies on *More Truck Lines*, 336 NLRB 772 (2001). That reliance is misplaced. In *More Truck Lines*, the employer informed employees, shortly before an election involving an incumbent union and a challenger seeking to oust it that if the challenger won, its collective-bargaining agreement would be "null and void" and they would not receive the annual wage increases specified in that agreement. The Board found these statements objectionable because the annual wage increases were conditions of employment; they were a reasonable expectancy of the employment relationship because the timing and amount of those increases was specified in the collective-bargaining agreement. In the instant case, we are not dealing with an annual wage increase to which the Employer by agreement was obligated. Nor, as mentioned, is there evidence of regular wage cuts and restorations much less a collective-bargaining agreement that contains provisions relating to such wage actions.[3]

*Liberty Telephone*, supra, cited by my colleagues, is not to the contrary. At issue there was the employer's decision to withhold from its newly represented employees a wage increase that had been promised to all employees subject only to governmental approval. The increase was in keeping with the employer's practice of adjusting wages twice annually, and the specific amount had been fixed and communicated to employees. Id. at 321 fn. 3. It was only in that context that the Board stated that a condition of employment "includes not only what the employer has already granted, but also what he 'proposes to grant.'" Thus, the promised wage increases were definite as to timing and amount, while the Employer's general statements about wage restoration here were not.[4]

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[1] Cf., *Lee's Summit Hospital & Health Midwest*, 338 NLRB No. 116, slip op. at 2 fn. 3 (2003) (employer violated the Act by withholding a wage adjustment that the Board found had become an established pattern and practice over many years and therefore was a condition of employment).

[2] Cf., *Liberty Telephone & Communications Inc.*, 204 NLRB 317 (1973) (promise rises to the level of condition of employment when it "in fact acted as an inducement to employees to accept or continue employment").

[3] I take particular exception to the hearing officer's reliance on *More Truck Lines* to find that "once the union organizing drive began, the Employer was required to maintain the status quo *and inform employees that their selection of the Union as their bargaining representative would not have any effect on its promise regarding restoration of the wage rate."* (Emphasis added.) Contrary to the hearing officer's implication, *More Truck Lines* does not impose an affirmative obligation on an employer to tell employees that the union election has no effect on its decision making process. I note with approval that my colleagues do not rely on this mistaken proposition nor impose such a duty.

[4] *United Aircraft Corp.*, 199 NLRB 658, 661 (1972) (employer unlawfully withheld promised wage increase after union certification where before election employer had posted a notice announcing 8 percent wage increase effective April 21, 1969), and *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 847 (5th Cir. 1954) (employer announced 7.4-

My colleagues seize on a few words from the Board's decision in *Liberty Telephone*, namely, that terms and conditions of employment include "announced or expected benefits" and then argue that since the Board used the disjunctive, an "announced—even if unexpected—benefit . . . fits easily within the definition of terms and conditions of employment." My colleagues miss the point and unnecessarily confuse long-standing Board and court law on this issue. See *American Mirror Co*., supra; *NLRB v. Allis-Chalmers Corp.*, supra. Simply put, a mere "announcement" of a possible future benefit, conditioned on an event that may never come to pass, and where the standard for meeting that condition is subjective, does not rise to the level of a term and condition of employment. This is due to the lack of "reasonable certainty" as to the timing and implementation of the benefit. *American Mirror Co.*, supra, 269 NLRB at 1094. *Liberty Telephone* should not be read to the contrary.

As mentioned, *Liberty Telephone* involved a program of two wage increases which the employer had a "long-standing policy and practice" of granting every year in January and July. The employer unilaterally withheld the promised July increase after the union was certified. It was in this context that the *Liberty Telephone* Board said,

> in determining whether a particular matter or program is a term and condition of employment . . . , the Board and courts have properly considered whether the program is a *reasonable* expectancy of the employment relationship, i.e., whether the program *in fact* acted as an inducement to employees to accept or continue employment. [Emphasis added.]

204 NLRB at 317–318. As an example of a case where a reasonable expectancy was established, the *Liberty Telephone* Board cited *Armstrong Cork Co. v. NLRB*, 211 F.2d 843 (5th Cir. 1954). In *Armstrong*, the employer announced a 7.4 percent wage increase for all employees, conditioned only on approval by the Wage Stabilization Board. After the union's certification, the employer cancelled the proposed increase insofar as applicable to the union employees. The court found that this withdrawal was "equivalent to changing 'conditions of employment,' for the definition of the quoted phrase includes not only 'what the employer has already granted,' but also what he 'proposes to grant.'" Id. at 847.

In both *Liberty Telephone* and *Armstrong*, however, employees had a reasonable expectancy that they would receive the announced wage increase because it was specific as to timing and amount and the only condition for its bestowal was an objective one—approval by the federal government. As shown, no such *reasonable* expectancy was established by the Employer's stated desire to restore wages. By nevertheless finding a condition of employment here, my colleagues distort the principles set forth in *Liberty Telephone* and work a significant and unwarranted change in Board law.

*Pearson Education, Inc.*, 336 NLRB 979 (2001), cited by the majority, is likewise distinguishable. In that case, after the filing of the election petition and 12 days before the election, the employer announced that bargaining unit employees who remained with the employer following the relocation of its plant, would receive a $1.10 per-hour-wage increase effective with the opening of the new facility, and told employees that the relocation was scheduled to take place on January 1, 1998. A few days before the election, the employer distributed a leaflet telling employees that it would be free to move ahead with the announced wage increases without a union, but "[w]ith a union, since all wages and benefits would be subject to negotiation no one can predict what the final wage package would be."[5]

Unlike the Employer's statements about restoring the wage cuts if it became profitable and achieved "financial stability," the announced wage increase in *Pearson* was specific as to both timing and amount. There was no provision for discretion on the employer's part—the decision to relocate had already been made and all employees who stayed with the company and moved with it to the new plant would receive the wage increase. In the present case, the Employer made no such specific representation, but told employees that it would restore wages when it determined it was profitable, at a time and in a manner of its choosing.

Because the Employer would have been obligated to bargain, if its employees had voted in favor of union representation, before restoring their wages to pre-March levels, it did not threaten employees when it informed them of this legal fact.[6] Again, Board precedent mandates this result. In *American Mirror Co*., supra, 269 NLRB at 1094, the Board found no violation where the company president told all employees in a meeting 2 days before the election that no raises would be given

percent wage increase effective on approval by Wage Stabilization Board but withheld it after union was certified), which are cited in *Liberty Telephone*, are distinguishable for the same reasons.

[5] The leaflet asked the rhetorical question "What do you have to lose?" and answered that question by listing the annualized amount of the announced wage increase— $2,522.

[6] The Employer did not tell employees they would be "out of the running" for the wage restoration if the Union won the election, as my colleagues say. Rather, the Employer lawfully and accurately told the employees that any decision regarding the restoration would be taken to the Union for bargaining.

because of the union campaign. In that case, the Board found that the statement was not coercive or threatening, but merely reflected the true legal position of the company, that no wage increase could be given. Similarly, in this case, since the Employer's statements regarding restoration of the wages if and when financial stability was achieved did not establish a condition of employment, its subsequent statements during the union campaign, both written and verbal, were not threats, but lawful descriptions of the Employer's obligations under the law. Id.; see also *Oxford Pickles*, 190 NLRB 109 (1971) (accurate statements of law and facts do not amount to implied threats).

The majority deprecates the usefulness of *American Mirror* as a guide to the disposition of this case by characterizing it as factually inapplicable. My colleagues also question whether *American Mirror* remains good law. I cannot agree with either proposition.

The issue in *American Mirror* was whether a term or condition of employment existed. Because that is the issue before us here, the decision and reasoning adopted by the Board in *American Mirror* are applicable to the disposition of this case. In *American Mirror*, the employer had a practice of awarding periodic general wage increases which varied in timing and amount. In finding that no term or condition of employment was established by this practice, the Board reasoned:

> The Board makes a distinction between an announced and scheduled increase, considering the same as an existing benefit, and a possible or expected increase but not one based on promise but upon increases in previous years where no specific date or amount could be set with any degree of certainty.

269 NLRB at 1094. These same principles are clearly applicable to the instant case. Here, as in *American Mirror*, the potential wage restoration was not "scheduled," but could have taken place at any time, or not at all, and "no specific date or amount could be set with any degree of certainty." Accordingly, no term or condition of employment has been established in this case.

As to whether *American Mirror* was correctly decided, the case is extant Board law and wholly consistent with the established body of law dealing with the quantum of evidence required to establish a condition of employment. In my view, it was correctly decided and, therefore, I have relied upon it.

Thus, the Employer did not threaten the employees with the loss of a promised wage increase, but rather, the Employer lawfully informed the employees that it would have to bargain with the Union over the discretionary decision to restore their wages and the process for doing so. Because the Employer's statements were not objectionable conduct, I would certify the results of the election.

Dated, Washington, D.C. April 15, 2004

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD